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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

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HENRY TURNEY _____ *Petitioner*

v.

STATE OF ARKANSAS _____ *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in this matter October 25, 1965, and as to which rehearing was denied November 22, 1965.

Note: The time within which to file this petition was, on February 16, 1966, extended to and including April 20, 1966, by order of Mr. Justice White. (See Appendix C.)

CITATION TO OPINIONS BELOW

The pertinent opinions of the Supreme Court of Arkansas (R.64-77 and 167-171) are reported in 237 Ark. 569, 375 S.W. 2d 375, and 239 Ark. 851, 395 S.W. 2d 1, and are printed in Appendix A and Appendix B hereto, respectively, infra.

JURISDICTION

The judgment of the Supreme Court ol Arkansas as to which review is sought was entered October 25, 1965 (R.172). It denied the petitioner's application for leave to file a petition for a writ of error *coram nobis* in the Circuit Court of Lonoke County, Arkansas. Rehearing was denied November 22, 1965 (R.175).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the Supreme Court of Arkansas did not deprive the petitioner of his rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in denying him, on the merits, permission to seek a writ of error *coram nobis* in the trial court, the Circuit Court of Lonoke County, Arkansas, for a review of his conviction in that court in circumstances indicating that the conviction was based solely on (a) certain admissions, or confessions, allegedly made by him, which if made at all, were made without the advice of counsel or an opportunity to consult with counsel; (b) evidence obtained as a result of so-called confessions of others, which, true or not, were made because of torture and under circumstances amounting to a deprivation of the right to counsel; (c) evidence obtained as a result of unreasonable searches and seizures; (d) unfair procedure whereby the petitioner was prosecuted by information of a prosecuting attorney without preliminary examination by any judicial officer or indictment by grand jury, and (e) unfair procedure whereby the trial court permitted

the jury to decide both the voluntariness and the truth or falsity of the petitioner's alleged admissions or confessions.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment

Section 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The petitioner Henry Turney was arrested at his home in Conway, Faulkner County, Arkansas, at about 4:30 a.m., February 19, 1962, and charged with burglary and grand larceny (R.1, 257).

Preceding this, it appears that, at some time between 8:00 p.m., February 17, 1962, and 8:00 a.m., February 18, 1962, a house, owned by Roy Nelson, near Lonoke, Lonoke County, Arkansas, had been entered and some property stolen therefrom (R.206).

At about 12:30 a.m., February 18, 1962, Danny Bryant had driven by the Nelson house and had seen a truck with some people in it parked without lights on the shoulder of the road nearby. Later, the same day, Bryant heard of the burglary and larceny, so he reported to Nelson what he had seen. Nelson, in turn gave the information to Sheriff Warren Minton, Lonoke County (R. 185-187).

Sheriff Minton had previously been apprised (R.300-302) that, on February 14, 1962, Trooper Bill Brashers, Arkansas State Police, had stopped a truck, similar to that described by Bryant, near Lonoke because it had no tail lights. Marvin Stripling, Conway, was the driver. Turney, Stripling's employer, was the owner of record. Stripling could not exhibit a license to drive, so he was on that account arrested, taken to the city hall in Lonoke, and charged. Stripling telephoned Turney in Conway. After a while, Turney appeared, posted a bond for Stripling, and left with Stripling in the truck (R.192-205).

Since the description of the truck in the incident reported by Bryant was similar to that of the truck in the

incident reported by Trooper Brashers, Sheriff Minton centered his investigation on Conway.

Sheriff Minton, consequently, accompanied by Sgt. Leslie Caldwell, Arkansas State Police, went to Conway. There they learned that Jess Holeman, Conway, drove a truck of similar description (R.302). They went to Holeman's house and arrested him at about 10:00 p.m., February 18, 1962 (R.253). When the officers arrived at Holeman's house, they sought to search it, but a search warrant was demanded of them. They had no search warrant, (R.248) so they left, but returned shortly and announced that they had obtained a search warrant (R. 381). They searched Holeman's house, but found nothing (R.253-254). However, they found some of the stolen property in a truck parked in front of Holeman's house (R.254). A few minutes later, the officers proceeded to Stripling's home, about one-half block from Holeman's home, and arrested Stripling (R.250-251, 253).

Holeman and Stripling were taken from Conway to Lonoke where, at the city police station, they were separated for questioning (R.254). Thereupon, Holeman and Stripling, according to Sheriff Minton and Sgt. Caldwell, made confessions and implicated Turney and George Frank Williams (R.257, 283).

The record is replete with evidence indicating that the alleged confessions of Holeman and Stripling were obtained by torture and other coercive methods. (See testimony of: Holeman, R.447 *et seq.;* Stripling, R. 455 *et seq.;* Henry Stripling, R.368 *et seq.;* Dorothy Stripling, R.372 *et seq.,* and 481 *et seq.;* Mrs. Marvin Stripling, R. 385 *et seq.,* and R.477 *et seq.*) Sheriff Minton admitted that he interrogated Stripling with Stripling's hands handcuffed behind him (R.333), and that Stripling bled

at the nose so that a physician had to be called to treat him (R.322-324). Sheriff Minton also admitted that he might have told the physician that Stripling's "nose got bumped" (R.333). Sgt. Caldwell admitted that there was blood on Stripling's clothing (R.287). However, the officers attributed Stripling's condition to the fact that he was "a free bleeder" (R.307).

After the officers had obtained from Holeman and Stripling these "voluntary" confessions, which implicated Turney, they returned to Conway and arrested Turney. They took Holeman back to Conway with them, but left Stripling in Lonoke so that he might receive additional medical care if he needed it (R.308). After the officers arrested Turney, they arrested Williams and drove to the city police station in Conway where they had left Holeman (R.309). They then went to an all-night service station in Conway where they obtained a trailer hitch to attach to Holeman's truck before proceeding to Holeman's house trailer where they had been informed the stolen property was (R.258, 309). Sheriff Minton and Sgt. Caldwell testified that Sgt. Caldwell took Turney to the rear of the automobile in which they had been riding, which was then stopped at the service station, and upon questioning, Turney admitted that he was involved in the burglary and larceny (R.258, 309-311). Thereafter, the officers, along with Nelson, the person whose property had been stolen, Holeman and Turney proceeded to Holeman's house trailer (R.258). Turney had acquired the house trailer from William R. Fiser in October, 1961, and had in turn sold it to Holeman (R.336-339). Fiser had given Turney three keys to the trailer on three separate occasions. At the time in question, Turney still had one of these keys in his possession because he

had not had an opportunity to turn it over to Holeman (R.444). Therefore, when the officers reached the house trailer the key in Turney's possession was used to gain entry. Most of the stolen property was recovered from the house trailer and the rest of it was recovered from Turney's house occupied by his father-in-law (R.259-260). An itemized list of the property so recovered was introduced in evidence against Turney (See State's Exhibit A, R.401). Neither Holeman nor Turney objected to the search of the house trailer or the house occupied by Turney's father-in-law because they had been told by the officers that they had search warrants (R.436-439, 443-4445, 453). The officers never denied that they told Turney or Holeman that they had search warrants, but they maintained that Turney and Holeman gave them permission to search (R.304, 310, 311, 312, 325, 326, 259, 260, 292, 293).

After these events, the group returned to Lonoke. Turney, Sgt. Caldwell, Nelson, Williams, and Sheriff Minton rode in Sheriff Minton's car. Sheriff Minton testified that Turney, when they pased the place from which the property had been stolen, showed them the drive way they had used and the fence they had cut to load the stolen items. Sheriff Minton also testified that Turney showed them the house from which they had taken the property and said that they had "cased" the house on a previous occasion (R.313). The only thing in the record concerning whether Turney was advised of his rights at the time when he allegedly admitted to the officers his implication in the burglary and larceny is the folowing testimony of Sgt. Caldwell:

> "Q. Was there any force or threats against the defendants?

A. No, sir.

Q. Any promise or reward?

A. No, sir.

Q. Were they beaten or mistreated?

A. No, sir.

Q. Were they advised that they did not have to tell you anything if they didn't want to?

A. No, sir.

Q. They were not?

A. No, sir'' (R.252).

Turney was tried before a petit jury in the Circuit Court of Lonoke County, upon an information filed by the Prosecuting Attorney. He has never been indicted by a grand jury (R.1). The record does not reflect that there was a preliminary hearing.

The jury returned a verdict of guilty against Turney on November 3, 1962, and judgment was entered thereon on November 10, 1962 (R.403).

Turney duly appealed his conviction to the Supreme Court of Arkansas and the judgment of conviction was affirmed on January 27, 1964, one judge dissenting. *Williams et al* v. *State*, 237 Ark. 569, 375 S.W. 2d 375 (R. 64-77). Rehearing was denied by the Supreme Court of Arkansas March 9, 1964 (R.90). Turney filed a notice of appeal to the Supreme Court of the United States on

June 3, 1964, (R.90A) and an amended notice of appeal to the Supreme Court of the United States on February 10, 1965 (R.90E). On July 21, 1964, the time for docketing the aforesaid appeal with the Clerk of the Supreme Court of the United States was extended to and including January 2, 1965, (R.90C) and on December 21, 1964, further extended to and including March 1, 1965, (R.90D) by Mr. Justice Johnson of the Supreme Court of Arkansas.

On May 17, 1965, the Supreme Court of the United States, *per curiam*, made the following order. "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied" (R.90G). *Turney* v. *Arkansas*, 381 U.S. 276.

On June 15, 1965, Turney duly filed in the Supreme Court of Arkansas a motion for permission to file a petition for a writ of error *coram nobis* in the Circuit Court of Lonoke County, Arkansas. Thereafter, in accordance with the order of the Supreme Court of Arkansas Turney filed his printed brief and abstract (R.107). On October 25, 1965, the Supreme Court of Arkansas denied the motion for permission to file a petition for a writ of error *coram nobis* (R.167, 172). *Turney* v. *State of Arkansas*, 239 Ark. 851, 395 S.W. 2d 1. Rehearing was denied on November 22, 1965 (R.175).

On February 16, 1966, Mr. Justice Byron R. White of this Court granted to Turney an extention to and including April 20, 1966, within which to file a petition for a writ of certiorari to review the last cited decision of the Supreme Court of Arkansas. (See Appendix C.)

The question presented for review here was raised in the Supreme Court of Arkansas by the petition filed therein by Turney for permission to seek a writ of error *coram nobis* in the Circuit Court of Lonoke County, Arkansas (R.91-96). In the trial court the matter of "the assistance of counsel" was raised by numerous objections to the introduction of testimony of the police officers relative to incriminating statements allegedly made by Turney during his interrogation and afterward. These objections were overruled. This matter was also brought to the attention of the trial court in paragraph 9 of Turney's motion for a new trial, in which it was contended: "The trial court erred in permitting several witnesses for the State to testify over the objections of counsel that the testimony and evidence secured by said witnesses were obtained in violation of the legal rights of the defendant, in violation of the Federal and State Constitutional rights of the defendant, and that it was upon said evidence and testimony solely, that the verdicts herein were returned" (R.49). This motion was ovreruled (R. 57A). The Supreme Court of Arkansas, on direct appeal, did not specifically refer to this matter except to say that it had examined all assignments of error and found no reversible error in the record (R.79).

In the trial court the matter of the admission of evidence obtained as a result of the alleged coerced confessions of others was raised by a motion to quash filed October 31, 1962, the day before trial (R.45). The motion was overruled (R.488). Further objection was made at the trial, and it was overruled (R.307). The matter was again urged in Turney's motion for a new trial (R. 48-50) and again was overruled (R.57A). The Supreme Court on direct appeal found no error in this connection (R.66-68). In the trial court the matter of "unreason-

able searches and seizures" was raised by numerous objections, by motion to suppress (R.45) which was overruled (R.488) and by Turney's motion for a new trial (R.48) which was overruled (R.57A). The Supreme Court of Arkansas on direct appeal held that Turney had waived his rights in this regard (R.69-75). In the trial court the matter of the constitutional invalidity of proceeding against Turney under the information was raised by motion to quash (R.45, 82) which was overruled (R. 57A). The Supreme Court of Arkansas on direct appeal did not deal specifically with this matter, except to say that it had examined all assignments of error and found no reversible error in the record (R.79). In the trial court the matter of permitting the jury to pass on both the voluntariness and the truth or falsity of Turney's alleged admissions or confessions was raised by motion to suppress (R.45) which was overruled (R.488), the court expressly and repeatedly refusing to pass on the question of voluntariness (R.484-488). This matter was the subject of numerous objections during the trial, which were overruled, and was raised in Turney's motion for a new trial, paragraphs 2, 5, 9, and 11 (R.48-50) which was overruled (R.57A). The Supreme Court of Arkansas on direct appeal held that there was no error in the trial court's ruling which permitted the jury to pass on the voluntariness of the alleged admissions or confessions as well as the truth or falsity thereof (R.68).

All of the matters involved in the question presented for review were called to the attention of this Court in *Turney* v. *Arkansas*, 381 U.S. 276. However, the question presented has not been passed upon by this Court.

REASONS FOR GRANTING THE WRIT

A most important matter must be observed at the outset, that is, that the Supreme Court of Arkansas in its opinion expounding the reasons for denying Turney permission to seek review by petition for a writ or error *coram nobis* in the trial court obviously dealt with his application as though it were just another direct appeal from his conviction. It decided on the basis of the record that no constitutional right of Turney's had been violated. The judgment of the Supreme Court of Arkansas, therefore, is in effect simply a reaffirmance of the judgment which it had rendered on direct appeal.

Turney was required to seek permission of the Supreme Court of Arkansas as a condition to his right to file a petition for a writ of error *coram nobis* in the trial court. See *State* v. *Hudspeth,* 191 Ark. 963, 971, 88 S.W. 2d 858, 861, wherein it was held that "when a judgment has been affirmed by this court no application may be made to the trial court without permission to make such application has been given by this court, . . .". It was not a proper function of the Supreme Court of Arkansas to treat Turney's petition as though it were a direct application to it for a writ of error *coram nobis* and to decide his allegations on the merits. The office of that court was simply to pass upon the probability or improbability of the allegations. The question of the actual truth or falsity of the grounds asserted was for the trial court. Only when the allegations of a *coram nobis* petition are improbable should permission in the premises be denied. See *Taylor* v. *Alabama,* 335 U.S. 252.

The final paragraph of this opinion of the Supreme Court of Arkansas is significant. It is:

> "We have concluded that movant was not deprived of any constitutional right, either under the Federal or State constitution, and it follows that the motion seeking permission to file a petition for a writ of error *coram nobis* is denied" (R.171).

The Supreme Court of Arkansas, therefore, recognized that the *coram nobis* procedure is a proper remedy, in the circumstances of this case, for the correction of errors arising out of the denial of constitutional rights in a criminal prosecution. In *Dement* v. *State,* 236 Ark. 851, 370 S.W. 2d 191, the Supreme Court of Arkansas expressly held that *coram nobis* was the proper remedy for one who was convicted on a plea of guilty, admittedly without counsel, where the record was silent on the question whether he was offered counsel and if so whether he in fact waived the right to counsel. Moreover, this appears to be the general rule in most jurisdictions. 18 Am. Jur. 2d, *Coram Nobis,* etc., Sec. 17. In this connection it is also noteworthy that the Attorney General of Arkansas in his response to Turney's petition to the Supreme Court of Arkansas in no way questioned the appropriatness of the remedy of *coram nobis,* but simply resisted the petition on the ground that Turney had not shown probable cause for that remedy in the trial court (R.155-166).

Consequently, if it appears that there was and is a probability that Turney has been deprived of his rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and that such deprivation affected the judgment of the trial court, then the judgment of the Supreme Court of Arkansas was erroneous and should be reversed.

Although this case has previously been before this Court, *Turney* v. *Arkansas*, 381 U.S. 276, it was then in a different form. The appeal was dismissed for want of jurisdiction. This Court acted on the matter as a petition for certiorari, and denied certiorari. Since the granting or denying of the writ of certiorari is discretionary, *Philadelphia, etc., Coal, etc., Co.* v. *Gilbert*, 245 U.S. 162, and since this Court's denial of certiorari imports no expression of opinion upon the merits of a case, *Atlantic Coast Line R. Co.* v. *Powe*, 283 U.S. 401, it is of course not possible to determine whether the merits of any of the reasons urged here for the reversal of the judgment below have in fact been determined by this Court. In view of this it is not deemed necessary to treat this Court's *per curiam* order as having the effect of *res judicata* on the issues involved in this proceeding.

Accordingly, it is most earnestly contended that the decision of the Supreme Court of Arkansas in denying Turney the right to file a petition for a writ of error *coram nobis* in the trial court should be reversed because his application, when viewed in the light of the record, showed that it was highly probable that his rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States had been violated in the following particular respects:

(a) *The Admissions or Confessions Allegedly Made by Turney, if Made at All, Were Made Without the Advice of Counsel or an Opportunity to Consult With Counsel.*

In his affidavit annexed to his petition filed in the Supreme Court of Arkansas, Turney asserted that, at the time of his arrest and interrogation, he did not have the advice of counsel and that he was not advised that he did not have to answer questions. Further, he asserted that

Sheriff Minton refused his request for permission to call a lawyer, though this evidently was after he had already been questioned (R.102-103). This affadavit (R.98), shows that Turney had little education, no criminal record, and only the foggiest idea of his constitutional rights. Nothing in the record of trial contradicts the assertions in this affidavit. In fact, Turney is corroborated by the testimony of Sgt. Caldwell on at least one point, that is, that Turney was not advised that he did not have to make a statement (R.252). The Supreme Court of Arkansas took this to be a fact (R.168). There is nothing in the record to show that Turney was advised of his right to counsel or even that he was aware of this right, much less that he intelligently waived it, in spite of the strange statement of the Supreme Court of Arkansas that:

> "Turney does not appear to have been completely ignorant of legal procedure, for at arraignment he entered a plea of not guilty, and was advised that he should obtain an attorney. He thereupon employed competent counsel, who represented him in the trial of the case" (R.171).

The record of trial does not show whether there was in fact any formal arraignment, though there is a recitation in the judgment of the trial court that Turney pleaded not guilty (R.403). So it is not at all clear just how the plea of not guilty came about, whether Turney announced "Not guilty" or whether the trial court entered the plea after advising Turney that he should so plead. The only other reference to arraignment is in Turney's affidavit where he said:

> "After we had been in jail three days, we were taken before Judge Waggoner, the Circuit Judge of Lonoke County. We weren't taken before any other Judge to enter a plea. At the time I was

> taken before Judge Waggoner, I told him I was not guilty and he said that as I had entered a plea of not guilty I had better get myself a lawyer. It was then that Sheriff Minton permitted me to make a telephone call to a lawyer'' (R.103-104).

But, the reasoning of the Supreme Court of Arkansas to the effect that entering a plea of not guilty can create an inference that one is not ''completely ignorant of legal procedure'' is violative of the most fundamental principles of American law, which presumes a man to be innocent until his guilt is established beyond a reasonable doubt. This is the only permissible presumption that could arise from a plea of not guilty. A careful reading of the entire opinion of the Supreme Court of Arkansas, it is suggested, will reveal that this fallacious reasoning is not singular.

Turney's conviction was affirmed on direct appeal on January 27, 1964 (R.80) and rehearing was denied on March 9, 1964 (R.90) prior to the decision of *Escobedo* v. *Illinois*, 378 U.S. 478, on June 22, 1964. However, Turney had duly appealed to this Court and his appeal was pending when *Escobedo* was decided (R.90A-90G). Therefore, the *Escobedo* decision is applicable to the case at bar. See *Linkletter* v. *Walker*, 381 U.S. 618, 627. In *Escobedo* this Court said:

> ". . . (W)here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute

> constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . and . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial." *Escobedo* v. *Illinois,* 378 U.S. 478, 490-491.

It is true that in the Escobedo case the suspect had requested and had been denied an opportunity to consult with his lawyer, and in the instant case it does not appear either that Turney had or had not, at the time he was questioned by Sgt. Caldwell and allegedly made incriminating statements, asked for and been denied the right to consult with counsel.

As a general proposition, there is no question but that a constitutional right can be waived. In the majority opinion in *Escobedo* it is said: "The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at trial." 378 U.S. 490, note 14. But, the standard for determining waiver is a federal standard. *Fay* v. *Noia,* 372 U.S. 391. The federal test is whether there has been "an intentional relinquishment or abandonment of a known right or privilege." And, "courts indulge every reasonable presumption against waiver . . .". *Johnson* v. *Zerbst,* 304 U.S. 458, 464. This Court has specifically held this test "applicable to asserted waivers of the right to counsel in state criminal proceedings." *Carnley* v. *Cochran,* 369 U.S. 506, 515. In *Carnley* v. *Cochran,* this Court has said:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 369 U.S. 506, at 516.

Also, "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." 369 U.S. 506, at 513.

Although it does not appear that this Court has as yet squarely decided exactly how the *Escobedo* principle is to be applied where it is not shown that the accused has requested counsel, it would certainly seem that, unless *Escobedo* is going to be nipped in the bud, this Court should adopt the approach of *People* v. *Dorado*, 42 Cal. Rep. 169, 398 P. 2d 362, wherein it was said:

> "The question presented here, then, centers upon whether the failure of the accused to retain or request counsel justifies the application of a rule of law different from that established in Escobedo. The basic reasoning of the court's opinion in Escobedo will not permit such a formalistic distinction." 42 Cal. Rep. 169, at 175, 398 P. 2d 361, at 367.

In spite of the recitations in the opinion of the Supreme Court of Arkansas to the contrary, it is obvious that when Sgt. Caldwell questioned Turney, "the point of necessary protection for guidance of counsel had been reached," that Sgt. Caldwell was conducting an "accusatory investigation" and not "a general inquiry into an unsolved crime." Sgt. Caldwell's investigation had focused on Turney. Sgt. Caldwell's interrogation was one that lent "itself to eliciting incriminating statements." Admittedly, Sgt. Caldwell had not effectively warned Turney of his absolute constitutional right to remain silent. In the opinion of the Supreme Court of Arkansas it was said that "Caldwell testified that he asked Turney 'point blank why would a man living in a house like he was, with his job, get involved in something like this, and he said he didn't know and that he must be out of his

mind. He then admitted his part in the theft to me and told me at that time where the property was'" • • • "It will be thus observed that Sergeant Caldwell was not carrying out a process of interrogation for the purpose of obtaining incriminating statements. The simple statement, above quoted was responded to by the spontaneous admission of guilt by Turney" (R.170).

These statements by the Supreme Court of Arkansas are extremely curious. To say that Sgt. Caldwell was not carrying out a process of interrogation tortures the facts. Certainly, Sgt. Caldwell did not question Turney simply out of idle curiosity. It is difficult to understand what is meant by the statement that Turney's alleged admission of guilt was spontaneous. Patently, Turney's alleged statement was not unprompted; it was, if Turney made the statement, undoubtedly in answer to Sgt. Caldwell's questioning. How, then, could it have been spontaneous?

Hence, the foregoing matters, alone, on a proper application of *Escobedo,* amply demonstrate the "probable cause" requiring the Supreme Court of Arkansas to grant Turney leave to proceed in *coram nobis* in the trial court.

(b) *All of the Evidence Against Turney Secured From Other Persons Was Secured by Unconstitutional Means.*

Not only was the evidence of Turney's alleged incriminating statements violative of the rule of *Escobedo,* but the alleged statements of Holeman and Stripling implicating Turney were also elicited in violation of the rights of Holeman and Stripling to have the advice of

counsel and by torture and coercion in violation of Due Process. *Payne* v. *Arkansas,* 356 U.S. 560; *Rochin* v. *California,* 342 U.S. 165. The record in its entirety leaves no doubt about this. (See, especially, testimony of Holeman, R.447 *et seq.;* Stripling, R.455 *et seq.;* Henry Stripling, R.368 *et seq.;* Dorothy Stripling, R.372 *et seq.,* and 481 *et seq.;* Mrs. Marvin Stripling, R.384 *et seq.,* and R.477 *et seq.;* Sheriff Minton, R.322-324, 333; Sgt. Caldwell, 287). The evidence against Turney obtained from Holeman and Stripling was, therefore, the "fruit" of the "poisonous tree" of police illegality. See *Wong Sun* v. *United States,* 371 U.S. 471; *Silverman* v. *United States,* 365 U.S. 505; *Nardone* v. *United States,* 308 U.S. 338; *Silverthorne* v. *United States,* 251 U.S. 385. In *Wong Sun,* this Court held that illegally obtained verbal evidence is no less the fruit of official illegality than the more common tangible fruits of an unwarranted intrusion and that the policies underlying the rule excluding illegally obtained evidence does not invite any logical distinctions between physical and verbal evidence, that the danger in relaxing the exclusionary rule in the case of verbal evidence would seem too great to warrant introducing such a distinction. It follows, necessarily, that the principles accounted in *Rochin* v. *California, supra, Payne* v. *Arkansas, supra, Escobedo* and in *Mapp* v. *Ohio,* 367 U.S. 643, equally require the exclusion of any evidence obtained directly by police illegality, whether such evidence is verbal or tangible, whether it is illegally obtained by federal or state officers, and whether it is sought to be used against the victim of police illegality or another.

(c) *All of the Tangible Evidence Involved Here Was Obtained as the Result of Unreasonable and Illegal Searches and Seizures.*

The Supreme Court of Arkansas (R.168), referred to its opinion on direct appeal wherein it was held that Turney had waived all of his rights relative to evidence obtained by search and seizure but, in that opinion, the Supreme Court of Arkansas said:

> "We are convinced from the evidence that the said search warrant so obtained was entirely void and worthless in every respect. It would serve no useful purpose to detail all of the evidence that impels us to such conclusion. The fact is that we proceed in the case as though there had been no search warrant of any kind" (R.70-71).

However, the record shows that Sheriff Minton and Sgt. Caldwell insisted at the trial that they had a warrant to search the Holeman house (R.304, 329, 248-250, 253-254, 262, 268-270, 289-290, 292-295). Mrs. Holeman testified that Sheriff Minton showed her a paper and said it was a search warrant, though he would not let her see it (R.380, 382). Mrs. Stripling testified that the officers searched the Stripling home on the assurance to her that they had a search warrant (R.384-385, 477, 480). Turney testified on his motion to supress that the officers represented to him that they had a search warrant for the Holeman house trailer and for Turney's house occupied by his father-in-law, though it was not shown to him, that he did not give permission to search (R.436-439, 443) but did not oppose the search because he believed the officers had a right to make the search (R.445). Holeman's testimony was to the same effect (R.447-449, 451-453).

Turney, in his affidavit annexed to his petition filed in the Supreme Court of Arkansas, asserted that the officers told him they had a warrant to search the Holeman house trailer and Turney's house occupied by his father-

in-law, and for that reason he did not resist the search (R. 102-103).

In these circumstances, it is difficult to conceive how the Supreme Court of Arkansas could consider the searches and seizures involved as reasonable and legal, how that court could find that the searches and seizures were conducted by consent. *Preston* v. *United States*, 376 U.S. 364. See also, *United States* v. *Roberts*, 223 F. Supp. 49 (E.D. Ark.). Cf. *Judd* v. *United States*, 190 F. 2d 649 (C.A.D.C.).

(d) *The Prosecution of Turney by Information Without Preliminary Examination and Without Indictment By Grand Jury Was Unfair.*

It is, of course, recognized that this Court has not so far deemed the requirement of the Fifth Amendment to the Constitution of the United States relative to prosecution by grand jury indictment to bind the states in any way. *Lem Woon* v. *Oregon*, 229 U.S. 586, decided in 1913, and *Hurtado* v. *California*, 110 U.S. 516, decided in 1884. *Lem Woon* is very similar to the case at bar in that it involved a prosecution on an information without preliminary examination held not to violate Due Process. *Hurtado* is distinguishable in that the state procedure concerned required either grand jury indictment or preliminary examination if a prosecution proceeded on information. Nevertheless, it does not seem improper to question whether *Lem Woon* has not outlived its validity in the light of constitutional developments since 1913. It is suggested that *Lem Woon* should be overruled, for it permits one to be prosecuted at the whim of the prosecutor without hearing or determination of probable cause by any judge or judicial body. Moreover, when the

prosecution by information proceeds without the right to preliminary examination as in this case, the accused has no means of knowing what evidence he will be required to meet. It is apparent that the accused's right to be confronted by the witnesses against him is thereby severely curtailed if not rendered practically nugatory.

This Court is, therefore, earnestly invited to reconsider its decision in *Lem Woon* v. *Oregon* in the context of its recent decisions expanding the concept of Due Process.

In any event, the procedure followed in Turney's prosecution by direct information in the trial court without the benefit of a preliminary hearing ought to be taken into account, as a procedure barely worthy of the stamp of Due Process, which when regarded along with all the other unfair or questionable elements of the instant case, adds the straw that breaks the camel's back and calls for a reversal of the decision of the Supreme Court or Arkansas.

(e) *The Method of the Trial Court in Determining the Voluntariness of Turney's Alleged Admissions or Confessions Was Invalid.*

This Court on June 22, 1964, in *Jackson* v. *Denno*, 378 U.S. 368, condemned exactly the same procedure for determining the voluntariness of an alleged confession as the trial court followed here, that is to say, permitting the jury to decide both the fact of the voluntariness or involuntariness of the alleged confession and the fact of the truth or falsity thereof. This is the "New York" Rule followed in Arkansas prior to the *Denno* decision, which is as follows:

> "If there is a factual conflict in the evidence as to voluntariness over which reasonable men could differ, the judge leaves the question of voluntariness to the jury." See *Monts* v. *State,* 233 Ark. 816, 823, 349 S.W. 2d 350, 355 (1961); *Burton* v. *State,* 204 Ark. 548, 550-551, 163 S.W. 2d 160, 162 (1943); *McClellan* v. *State,* 203 Ark. 386, 393-394, 156 S.W. 2d 800, 803 (1941).

In the opinion of the Supreme Court of Arkansas on Turney's direct appeal the following appears:

> "The Trial Court held that the issue of the voluntariness of the confessions was for the jury; and at the trial the officers just as stoutly denied all such mistreatment of the prisoners and claimed that the confessions were voluntarily given. We cannot say that there was error in the ruling of the Trial Court in submitting to the jury the issue of the voluntariness of the confessions. See *Jones* v. *State,* 213 Ark. 863, 213 S.W. 2d 974; and *Moore* v. *State,* 229 Ark. 335, 315 S.W. 2d 907. The issue of the voluntariness of the confessions was submitted to the jury under instructions not here claimed to be erroneous" (R.69).

The foregoing statement of the Supreme Court of Arkansas is taken at face value because it cannot be definitely ascertained from the record just what did happen in this connection.

Since Turney's conviction was in the process of direct appeal to this Court (R.90A-90G) when the *Denno* case was decided, that case is controlling. See *Linkletter* v. *Walker,* 381 U.S. 618, 627.

CONCLUSION

Even a casual reading of the record in this case demonstrates that the trial and the procedings leading thereto were hardly more than a parody of the procedure contemplated by Due Process of law. If it is borne in mind that Turney is simply asking permission to go back into the trial court on a writ of error *coram nobis,* it is apparent that he had shown the Supreme Court of Arkansas more than probable cause therefor. Consequently, this Court should reverse the decision of the Supreme Court of Arkansas and grant Turney the remedy he seeks.

Respectfully submitted,

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APPENDIX

A

WILLIAMS *et al* v. STATE
5074

Opinion delivered January 27, 1964

1. CRIMINAL LAW — EVIDENCE — ADMISSIBILITY OF MATTERS CONNECTING DEFENDANTS WITH CRIME. — Testimony of events regarding a truck that took place 4 days prior to the alleged crime held admissible to show identification and complicity which would connect the owner and driver of the same truck with the crimes charged.

2. CRIMINAL LAW — CONFESSIONS — VOLUNTARINESS OF CONFESSIONS JURY QUESTIONS. — The issue of the voluntariness of the confessions was a question for the jury.

3. SEARCHES AND SEIZURES — VIOLATION OF CONSTITUTIONAL RIGHTS. — The constitutional guaranty against illegal searches and seizures does not prohibit a seizure without a search warrant where the articles sought are visible to anyone.

4. SEARCHES AND SEIZURES — VIOLATION OF CONSTITUTIONAL RIGHTS. — The constitutional provisions against unreasonable search and seizure afforded appellants no shield against articles in a truck parked in the open which articles were seen by the officers and taken.

5. SEARCHES AND SEIZURES — WAIVER OF CONSENT BY ACTIVE PARTICIPATION. — Defendants held to have waived their constitutional rights against unreasonable searches and seizures by actively participating in the search and

assisting officers in loading the stolen articles into a truck for return to the owner.

6. CRIMINAL LAW — TRIAL — EXCLUSIONARY RULE. — The court refused to exclude the sheriff from the court room at the hearing to suppress evidence. Held: The court committed no error since the sheriff was not called to testify at said hearing.

7. CRIMINAL LAW — TRIAL — EXCLUSIONARY RULE. — On the jury trial, the court at first refused to exclude the sheriff, but before any witness testified for either side in the case, the court excluded the sheriff. Held: The court complied with Act 243 of 1955.

Appeal from Lonoke Circuit Court; W. J. Waggoner, Judge; affirmed.

Guy H. Jones and Francis T. Donovan, for appellant.

Bruce Bennett, Attorney General, By Jerry L. Patterson, Asst. Atty. General, for appellee.

Ed F. McFaddin, Associate Justice. The appellants are George Williams, Henry Turney, Jess Holeman, and Marvin Stripling. They were jointly charged, tried, and convicted of the crimes of burglary and grand larceny (Ark. Stat. Ann. §41-1001 and §41-3907 [1947]; and they prosecute this appeal. Henry Turney filed a separate motion for new trial containing eleven assignments, and the other three appellants filed a joint motion for new trial containing fourteen assignments. In addition, Williams filed a separate pleading entitled, "Motion to Set Aside the Verdict as to George Frank Williams," and this pleading contained two assignments. The appellants have grouped all their as-

signments in eighteen points which are presented in their point brief and we will group the various points in suitable topic headings.

The information charged — and the State's evidence was designed to establish — that on the 18th of February, 1962, the four named appellants committed the crimes of burglary and grand larceny by feloniously, etc., breaking and entering the building of Roy Nelson, Jr., in Lonoke County, Arkansas, and taking away hot water tanks, tools, plumbing equipment, a rifle, a chain saw, and various other items in excess of the value of $35.00. The appellants were arrested in Faulkner County on February 19, 1962; and the articles mentioned in the information were found and returned to the owner, Roy Nelson, Jr. The legality of alleged confessions and the way the officers obtained the property constitute some of the issues on this appeal, as well as other rulings in the course of the trial.

I. *Alleged Error In Admitting Testimony Relating To Matters Which Occurred Four Days Before The Crimes Were Alleged To Have Been Committed.* State Police Officer Bill Brashers testified that on February 14, 1962, he arrested Marvin Stripling in Lonoke County for driving a car without a driver's license; that Stripling was driving a *white Ford pick-up truck;* and that Stripling said the truck belonged to Henry Turney, who lived in Faulkner County, Arkansas. Brashers testified that he checked out the license number and found that the truck was registered in Turney's name. Lonoke City Officer Bobby Joe Davis testified that Brashers brought Stripling to the Lonoke City Hall; that Stripling called Turney in Conway, who came to Lonoke and posted bond for Stripling; and that Stripling and Turney left in the said white Ford pick-up truck.

Objections were made to all of this testimony because it related to events four days before the crimes here charged; but this testimony was admissible as links designed to connect Turney and Stripling with the crimes here charged, since it was testified that the *said white Ford pick-up truck* was the same one that was used to haul away the articles from Nelson's house on February 18th and some of the stolen property was found in the same truck, as will subsequently be mentioned. The evidence was that Turney and Stripling were together in the car that was subsequently used to carry away the stolen articles; and this evidence was for the purposes of showing identification and complicity in the crimes here charged. The evidence detailed circumstances tending to connect the owner and driver of the truck with the crimes charged; so the appellants' objections on this point are without merit.

II. *The Appellants Claim That The Alleged Confessions By Stripling And Holeman Should Not Have Been Admitted In Evidence.* Roy Nelson testified that on Saturday, February 17th, he was constructing a dwelling seven miles from Lonoke and worked until about 8 p.m.; that when he went back to work on Sunday morning, February 18th, he discovered that someone had stolen all of the material, supplies, parts, tools, etc., from the house, including hot water heaters, bathroom fixtures, doors, plywood, etc.; that he could see from the vehicle tire tracks on the ground where the vehicle and attached trailer had entered and left the premises; and that he immediately contacted the Sheriff of Lonoke County and gave him a list of the articles stolen of a value in excess of $2,000.00. Sheriff Minton of Lonoke County testified that after observing the tracks and other matters at the Nelson house, he suspected that the said *white Ford pick-up truck* which

Stripling had been driving on February 14th was the vehicle that had been used in the commission of the burglary and grand larceny. Minton further testified that he and State Policeman Caldwell and Mullenax obtained from a Justice of the Peace in Lonoke County "John Doe" warrants for the arrest of the occupants of the said truck; that they went to Conway where the truck was located at the home of appellant Holeman; and that Stripling and Holeman were arrested and taken to Lonoke and incarcerated. The officers testified that Holeman and Stripling confessed their parts in the crimes.

In advance of the jury the appellants moved to exclude the confessions of Holeman and Stripling as illegally extorted and as obtained under force and duress. At the said advance hearing Holeman and Stripling testified as to the alleged beatings, etc. administered to them to force the confessions. The Trial Court held that the issue of the voluntariness of the confessions was for the jury; and at the trial the officers just as stoutly denied all such mistreatment of the prisoners and claimed that the confessions were voluntarily given. We cannot say that there was error in the ruling of the Trial Court in submitting to the jury the issue of the voluntariness of the confessions. See *Jones* v. *State*, 213 Ark. 863, 213 S.W. 2d 974; and *Moore* v. *State*, 229 Ark. 335, 315 S.W. 2d 907. The issue of the voluntariness of the confessions was submitted to the jury under instructions not here claimed to be erroneous. The question of whether the arrests were made by the State Police Officer, who could make arrests in Faulkner County, or by Sheriff Minton of Lonoke County, who could not make arrests in Faulkner County, was a fact issue; and no error is claimed as to the instruction on this matter.

III. *Appellants Claim A Violation Of Their Constitutional Rights*[1] *Against Unreasonable Search and Seizure.* This point is most vigorously urged; and this is the most difficult question in the case. In advance of the jury trial the appellants presented their motion to suppress all evidence obtained by search and seizure and claimed that there were no valid search warrants. We recognize the holding of the Supreme Court of the United States in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933. Under that case, evidence illegally obtained is not admissible in the State courts, regardless of the previous holding of the State courts on the point. The question here is whether the facts in this case bring it within the holding of *Mapp* v. *Ohio.*[2]

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[1]The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Art. 2, Sec. 15 of the Arkansas Constitution provides:

"The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

[2]There are many annotations and law review articles concerning **Mapp v. Ohio,** which was decided June 19, 1961. We list only a few: "Federal constitution as affecting admissibility of evidence obtained by illegal search and seizure," in 84 A.L.R. 2d 959; "Constitutional Law, Searches and Seizures," 15 Ark. Law Rev. 445; "Search and Seizure — The Exclusionary Rule and the Question of Standing," in 17 Ark. Law Rev. 176; "Mapp v. Ohio: Pandora's Problems for the Prosecutor," in 111 U. of Pa. Law Rev. 4; "Midnight Welfare Searches and the Social Security Act," in 72 Yale Law Journal 1347. Distinct from the Mapp case there are a number of other pertinent and informative articles, some of which are: "Propriety or lawfulness of seizure, not incident to arrest, of papers, documents, letters, books and records not described in search warrant," in 79 A.L.R. 2d 1005;"Lawfulness of nonconsensual search and seizure without warrant prior to arrest," in 89 A.L.R. 2d 715; and "Search and Seizure: a No-man's Land in the Criminal Law," in 49 Cal. Law Rev. 474. Some of our more recent cases involving search and seizure are:**Clubb v. State,** 203 Ark. 688, 326 S.W. 2d 816; **Stewart v. State,** 233 Ark. 230, 343 S.W. 2d 568; **Burke v. State,** 235 Ark. (Adv. Sr.) 882, 362 S.W. 2d 695; and **Gerard v. State,** —— Ark. ——, —— S.W. 2d —— (Opinion delivered November 26, 1963).

The testimony of Officer Caldwell detailed the course of events. The officers first arrested Holeman about 10 p.m. February 18th, and then arrested Stripling about thirty minutes later. When Holeman was arrested the officers started ot search his house, but Mrs. Holeman refused them entrance until a search warrant could be shown her. The officers relayed the information back to Conway and claimed that they obtained a search warrant from the Municipal Court in Conway. We are convinced from the evidence that the said search warrant so obtained was entirely void and worthless in every respect. It would serve no useful purpose to detail all of the evidence that impels us to such conclusion. The fact is that we proceed is the case as though there had been no search warrant of any kind.

As aforesaid, Mrs. Holeman refused to allow a search of the house without a warrant. Armed with the said warrant the officers searched the Holeman house, but they found nothing; so such search, though illegal, obtained no evidence; and thus the search of the Holeman house passes out of the case. If any evidence had been obtained in the Holeman house we would promptly hold that such was illegally obtained.

There was the *white Ford pick-up truck* parked in front of Holeman's house; and in the truck the officers found a hand drill, some tools, and other miscellaneous articles, all of which were later identified by Nelson as having been stolen from him. Were these articles obtained from the truck in violation of the appellants' constitutional rights against unreasonable search and seizure? There was no entry into a house, building, or dwelling, in order to see these articles in the truck parked out in the open. In 79 C.J.S. p. 831, "Searches and Seizures" §66, cases from various jurisdictions are cited to sustain this

text: "The constitutional provisions against unreasonable searches and seizures do not prohibit a search without a search warrant that does not constitute a tresspass. Hence the obtaining of information by the eye, where it is not aided by a trespass, does not constitute an unlawful search, since no search is involved, and the use of a flashlight or searchlight in aid of vision does not render it illegal. The constitutional guaranty does not prohibit a seizure without a search warrant where the articles sought are disclosed to any one of the senses . . ." Thus the articles in the truck, parked out in the open, were seen by the officers and taken; and the constitutional provisions against unreasonable search and seizure afford the appellants no shield against the articles that were in the truck and so seized.

After the confessions of Stripling and Holeman, as heretofore mentional, warrants were obtained for the arrest of Williams and Turney; and in the early morning of February 19th they were arrested. According to the State's evidence, Turney told the officers that the stolen property was stored in a trailer near the settlement of Greenbrier in Faulkner County, several miles from Conway. Turney and Williams accompanied the officers to Greenbrier and pointed out the house trailer, and Turney unlocked the door to the trailer; and nearly all of the stolen property was found in the said house trailer. Turney and Williams assisted the officers in taking the articles out of the trailer and loading them into a truck so the articles could be returned to Nelson, the owner. Were the appellants' constitutional protections against unreasonable search and seizure violated by the officers thus obtaining the articles from the trailer and detailing the evidence concerning same? Here, there was evidence, not only of waiver and consent, but also of active parti-

cipation in the search; so there is no merit to the contention of the defendants that their rights against unreasonable search and seizure were violated insofar as concerns the articles in the trailer. In 79 C.J.S. p. 816 *et. seq.*, "Searches and Seizures" §62, there is a discussion of waiver and consent; and the holdings from the various jurisdictions — including the United States Supreme Court — are summarized:

"The constitutional immunity from unreasonable searches and seizures may be waived, as by a voluntary invitation or consent to a search or seizure. Thus individuals may waive their immunity to illegal searches of their persons, possessions, or dwelling houses, as well as to the illegal search of their premises, places of business, and searches and seizures of books, papers, or records. Hence, one who has thus consented to a search cannot thereafter complain of irregularities in the search warrant, or question its sufficiency or the manner of its issuance, since an invitation or consent to the search dispenses with the necessity of a search warrant altogether."[3]

The State's evidence further showed that after the articles from the house trailer had been recovered, as above mentioned, the officers asked Turney if there were any more stolen articles; and Turney said there was a hot water tank and sink at the home of his father-in-law a short distance away from the house trailer. The party of Turney, Williams and the officers, proceeded to that house. Turney and Williams went inside and brought out the hot water tank and sink, which were placed in the truck to be returned to Nelson. The officers asked Turney if any other stolen property was in the house; and

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[3]To the same general effect see 47 Am. Jur. p. 547, "Searches and Seizures" Sec. 71.

Turney turned on the light and told the officers they were welcome to look. They went in and found nothing except the connection to the sink, which was returned to Nelson with the other property.[4]

Were the appellants' constitutional protections against unreasonable search and seizure violated by the entrance into the home of the father-in-law and the obtaining of the hot water tank and sink and connection to the sink? According to the State's evidence, Turney and Williams voluntarily brought the hot water tank and sink from the house before the officers entered the house, so as to these articles there was no entry of the building by the officers. It is only as regards the connection to the sink that the officers entered the house of the father-in-law, who was not shown to have been present or anywhere in the vicinity or in any wise connected with any part of the case. Only the appellants are objecting to the actions of the officers. What we have said in regard to waiver and consent in the search of the trailer applies with equal force to the articles found in the house of Turney's father-in-law; so the defendants' constitutional rights against unreasonable search and seizure were not violated.

IV. *Refusal to Exclude Sheriff Minton From The Court Room.* The motions for new trial contain these two assignments:

"2. A motion to suppress all evidence illegally obtained, and motion to quash information based on said illegally obtained evidence, was filed by the defendants

[4]To complete the narrative it is proper to add that all of the stolen property was returned to Nelson on February 19th and he identified and inventoried it and receipted the officers for it. Nelson also testified as to admissions in the nature of confessions that some of the appellants made to him; but it is unnecessary to detail all such testimony.

herein. A hearing on said motion was had preceding the trial. The hearing was on an afternoon and the trial began the next morning. At the hearing the Rule was asked for, but the Court permitted the Sheriff of Lonoke County to stay in the Court Room and hear all of the defendants testify as to their illegal arrests, and the unlawful and illegal search and seizure of their premises. The Sheriff was also permitted to remain in the Courtroom the next morning, after both the State and the Defense had asked for the Rule. He remained there until the Jury was selected and during the opening statements of the Prosecuting Attorney and defense counsel, and the Court excluded him from the room at that point. This was error and in violation of Arkansas law which requires the exclusion of witnesses, when the rule is asked for.

"4. The trial court erred in refusing to exclude a witness for the State, Sheriff Warren Minton, upon the hearing of the motions to suppress evidence, after the rule was asked by defendants, and then permitting Sheriff Warren Minton to testify in the trial of these cases."

These assignments relate to a ruling at the preliminary hearing on the motion to suppress the evidence, as well as to a ruling made at the time of the jury trial. We find no merit in these assignments. The hearing before the Court on the motion to suppress the evidence was on a day in advance of the jury trial, and, of course, before the jury was selected. At the said hearing to suppress the appellants asked for "the rule"; and this occurred:

"THE COURT: I will let you have the rule. What witness do you want to call? The sheriff will have to remain to wait on the court, so what witness do you want to call.

MR. JONES: We object to any witness remaining in the court room.

THE COURT: I will permit the sheriff to remain.

MR. JONES: Note our exceptions to the presence of any witness that will testify.

THE COURT: All witnesses that are going to testify please stand and raise your right hand and be sworn in. The rule has been asked for so you will have to retire from the court room. Who is your first witness, Mr. Jones?"

Sheriff Minton was not called as a witness by the State or the appellants at the said hearing on the motion to suppress the evidence, so he was not a witness at that hearing, and thus the appellants were not deprived of any of their rights by the fact that the Sheriff waited on the Court at the hearing on the motion to suppress the evidence.

The Court denied the motion to suppress, and the next day the case came for trial. A jury was selected, and the following occurred at the beginning of the trial:

MR. JONES: Let the record show that the state has asked for the rule and witnesses for the State and the defendants are to retire to the witness rooms and Sheriff Minton will be a material witness in this cause and he is to remain in the court room after the rule has been asked for and let the record now reflect at this time we enter our objections on behalf of the defendants for the witness, Sheriff Minton to remain in the court room.

THE COURT: Lonoke County has only one sheriff and this court has got to have a sheriff to wait on it, to wait

on the Court in the calling of witnesses and to keep order in the Court and your motion will be overruled and you may save your exceptions.

MR. JONES: Note our exceptions.

MR. DONOVAN: Note the defendants' exceptions."

Then when Sheriff Minton was called as a witness the defendants objected to the Court allowing him to testify, and the following occurred:

"THE COURT: Let the record show I first overruled the motion because the Court stated that it needed some officer to wait on the court, but before any testimony was taken I changed that ruling and Mr. Minton was excluded from the Court room and he heard no testimony from any of the witnesses and the other testimony that he did hear was before the court in the absence of the jury and the jury did not hear any of that testimony as it was before the Court. I will overrule your motion.

MR. DONOVAN: Note our exceptions."

The appellants insist that under Act No. 243 of 1955 they had an absolute right to have Sheriff Minton excluded from the trial. Said Act reads:

"AN ACT to Amend Arkansas Statute (1947) §28-702 Authorizing the Exclusion of Witnesses in Criminal Actions.

"Be It Enacted by the General Assembly of hte State of Arkansas:

"SECTION 1. If the accused or his attorney requests it, the judge shall exclude from the court room any wit-

ness, including but not limited to the officers of the court, officers of the law and experts not at the time unedr examination, so that they may not hear the testimony of other witnesses."[5]

It is fairly evident from the statement made by the Trial Judge, as last quoted above, that shortly after the ruling that Sheriff Minton could remain in the court room the attention of the Court was called to the said Act No. 243 of 1955, and the Court then immediately excluded Sheriff Minton from the court room so that the Sheriff heard none of the testimony. We therefore see that the Sheriff was excluded and heard none of the testimony, and so no error was committed prejudicial to the appellants.

V. *Other Rulings Claimed As Error.* The appellants assigned as error a number of other rulings of the Trial Court, such as: alleged prejudicial remarks of the

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[5]Since we have not heretofore discussed Act No. 243 of 1955, it is proper to point out:

(a) That the Act is carried into Ark. Stat. as Sec. 43-2021 (Supp. 1963).

(b) The Act does not purport to amend Ark. Stat. Ann. Sec. 43-615 (1947) which relates to exclusion of witnesses at preliminary hearings.

(c) The caption of the Act No. 243 purports to apply only to criminal trials.

(d) Even though Ark. Stat. Ann. Sec. 28-702 (Repl. 1962) is a part of the Code of Civil Procedure, nevertheless Ark. Stat. Ann. Sec. 43-2004 (1947) provides that the rules of civil procedure apply generally in trial of criminal cases.

(e) Whether the language in Clubb v. State, 230 Ark. 688, 326 S.W. 2d 816, was a comment on the effect of Act No. 243 of 1955 is not necessary for decision here.

(f) Generally, see 8 Ark. Law Review 506 and 9 Ark. Law Review 402.

Prosecuting Attorney in the argument; refusal to exclude testimony of the witness Bryant; allowing certain officials to testify; remarks of the Trial Judge; and other rulings. To list and discuss all of these assignments would unduly extend this Opinion and serve no useful purpose. It is sufficient to say that we have examined each and all of the assignments and find no reversible error shown in the record.

Affirmed.

DISSENTING OPINION

JIM JOHNSON, Associate Justice. I do not agree with the majority opinion. In my view the majority has, this day effectively emasculated Act 243 of 1955 [Ark. Stat. Ann. §43-2021 (Supp. 1963)].

From the time of the adoption of the Civil Code until the year 1955, the applicable law on invoking the "Rule" to exclude witnesses from the court room in criminal cases was found in §658 of the Civil Code [Ark. Stat. Ann. §28-702 (Repl. 1962)], which reads as follows:

"If either party requires it, the judge *may* exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witness." [Emphasis ours.]

Under §658 of the Civil Code, this court held on numerous occasions that the matter of putting any witnesses under the "Rule" addressed itself to the sound discretion of the trial court. These decisions were sound, in that the statute in question employed the word "may" and certainly the employment of "may" clearly left the matter to the sound discretion of the trial judge. Under the cited section of the Civil Code, this court also held that it was not an abuse of discretion to refuse to place officers of the law under the "Rule". Again, because of the peculiar terminology of the statute in question, those decisions were sound.

However, in 1955, with the enactment of Act 243, the Legislature radically changed the law with reference to the exclusion of witnesses under the "Rule" in criminal cases. Section 1 of that Act reads as follows:

"If the accused or his attorney requests it, the judge *shall* exclude from the court room any witness, including *but not limited to the officers of the court, officers of the law* and experts not at the time under examination, so that they may not hear the testimony of other witnesses. [Emphasis ours.]

By the use of the word "shall" in the quoted statute, the Legislature unmistakably declared that the matter of whether witnesses would or would not be excluded from the court room no longer was left to the discretion of the trial court, but that upon demand of the defendant or his counsel, such exclusion became mandatory.

At the beginning of the trial of this case, the appellant sought to suppress certain evidence on the grounds (a) that some of the evidence was obtained by illegal search and seizure, and (b) that certain confessions had been obtained in violation of the defendants' constitutional rights. A lengthy hearing was held on this motion, and at the beginning of this hearing the appellants unequivocally demanded that Sheriff Minton be excluded from the hearing. They duly saved their exceptions to the court's refusal to honor their demand. In the course of that hearing there was testimony from a number of witnesses, including the testimony of some of the appellants. Their testimony was concerned with the circumstances under which certain searches were conducted and seizures made, as well as the circumstances under which certain alleged confessions were obtained. While the State called no witnesses in this hearing, a large part of the State's case in chief, as well as that of the defendants, was concerned with whether any evidence had been obtained as the result of illegal searches and seizures, or any confession obtained by compulsion. Thus, the sheriff,

who was to be a principal State witness, was enabled to learn in great detail the contentions of the defendants with reference to those two vital issues.

The basic error in refusing to exclude Sheriff Minton and allowing him to hear the testimony in question is because it was in direct violation of Act 243 of 1955. This Act was undoubtedly passed to prevent perjury and, more importantly, the opportunity to commit perjury. The policy of the law is to remove the opportunity for perjury and thereby to completely eliminate any question as to whether any witness altered his testimony to meet that of any other witness. There is no satisfactory way to determine what any particular individual may do when armed with knowledge of what other witnesses say. The primary purpose of the "Rule" is to prevent collusive testimony and to elicit the truth from each witness by preventing his being influenced by the testimony of others.

It is not the province of this court or of the trial court to determine questions of policy upon which the Legislature has spoken in such unmistakable terms when there is a valid ground for the exercise of legislative power. This court has not attempted to say that the statute in question is unconstitutional. Obviously, such is not the case. It is impossible to say whether the trial court's action in allowing the officer of the law to hear the testimony did the appellants any actual damage. However, a substantial right of the appellants was violated. It will not do so to speculate as to whether they were or not prejudiced thereby. If it be said that the sheriff in this case was an honorable man who would not stoop to perjury, my reply is that given by this court on several previous occasions: The answer is, "twill be recorded

for a precedent and many an error by the same example will rush into the state. It cannot be."

The efficacy of the "Rule" as an instrumentality designed to ferret out truth was first demonstrated in the Apocryphal Scriptures in the story of Susanna and the Elders, where Daniel was impelled by the Lord to separate the lustful elders as they testified in pursuit of their iniquitous desire to besmirch the honor and take the life of a virtuous woman. The result was the complete exoneration of Susanna. From that day until this, the "Rule" has been one of the brightest stars in the crown of justice. I could never vote for its abrogation. For the reason stated, I respectfully dissent.

APPENDIX

B

SUPREME COURT OF ARKANSAS
No. 5074

Opinion Delivered Oct. 25, 1965

HENRY TURNEY _____ *Petitioner*

v.

STATE OF ARKANSAS _____ *Respondent*

Motion of petitioner Henry Turney for permission to file a petition for writ of error *coram nobis*

Motion denied

CARLETON HARRIS, Chief Justice

This is a motion by Henry Turney for permission to file a petition for a writ of error *coram nobis* in the Circuit Court of Lonoke County, Arkansas. Turney was convicted of the crime of burglary and grand larceny on November 10, 1962, and he was sentenced to serve a term in the Arkansas Penitentiary. On January 27, 1964, this court affirmed the conviction, and a petition for rehearing was denied on March 9, 1964. Subsequently, on petition of Turney, this court stayed its mandate until the present motion could be briefed and passed upon. In filing this motion, counsel for Turney argues several points, which we proceed to discuss, though not in the order listed in petitioner's brief.

It is argued that Turney was deprived of his rights under the Fifth Amendment to the Constitution of the United States by virtue of the fact that he was tried and convicted upon an Information filed by the Prosecuting Attorney, rather than upon an Indictment rendered by a grand jury. We do not agree with this contention. The United States Supreme Court, in *Hurtado* v. *California,* 110 U.S. 516, and subsequent cases, has held that it is proper for a defendant to be tried in a state court upon an Information. We, likewise, have rejected this argument on several occasions. *Moore* v. *State,* 229 Ark. 335, 315 S.W. 2d 907, *Boone* v. *State,* 230 Ark. 821, 327 S.W. 2d 87.

It is asserted that Turney's rights were violated under the Fourth Amendment provision against unlawful search and seizure. This point was raised on direct appeal, and decided by this court adverse to petitioner's contention. There, after a thorough discussion of the contention, we held that Turney waived any rights (here allegedly violated) by giving his consent to the search, and we see no need to reopen this question.

It is next contended that Turney was not advised of his rights under the Fifth Amendment to the Constitution of the United States, and that he was not permitted to have the advice of counsel pursuant to the Sixth Amendment to the Federal Constitution.

It is also urged that certain admissions, which petitioner construes as a confession were involuntarily made. Since these two contentions are so closely related, we will discuss them together.

Petitioner relies upon the case of *Escobedo* v. *Illinois,* 378 U.S. 478. Admittedly, Turney was not represented by counsel at the time of his arrest, and the evidence re-

flects he was not advised by the officers that he would not have to make any statement.

We do not think that *Escobedo* extends to the circumstances in the case at Bar. The facts in *Escobedo* are far different, and are, we think, distinguishable from the facts in the instant case. In *Escobedo,* the defendant was arrested by police officers in the evening, along with his sister, and taken to police headquarters. He was handcuffed, and was told that another person, then in custody, (DiGerlando) had named him (Escobedo) as the one who shot the deceased. Uncontradicted testimony from the defendant was to the effect that he was told by detectives that "they had us pretty well, up pretty tight, and we might as well admit to this crime." The defendant responded that he would like to have advice from his lawyer. The lawyer, who subsequently testified, went to police headquarters, and was told by the officer in charge that he could not see the defendant. The attorney requested permission from several other officers, identifying Escobedo as his client, but he was still refused permission to consult with the defendant: "He said I couldn't see him because they hadn't completed questioning." Finally, the attorney left headquarters at 1:00 a.m., still without seeing the defendant. Escobedo testified that, during the course of the interrogation by the officers, he repeatedly asked to speak to his lawyer, but was told that his lawyer "didn't want ot see him". The testimony of the police officers confirmed these accounts in substantial detail. Other testimony reflected that the defendant, 22 years old, was handcuffed, and "was nervous, upset, and agitated;" further that one of the officers, acquainted with Escobedo's family, told the defendant that, if he made a statement against DiGerlando, Escobedo and his sister could go home. Defendant claimed

that he made a statement because of this assurance, and it was this statement that was at issue in the case.

We see no resemblance in the facts related and the facts that are presently before us. Here, Officer Caldwell, of the State Police, arrested Turney at his residence on Monday at approximately 4:30 a.m., serving a warrant of arrest, which had been issued by a Justice of the Peace. Caldwell testified that he asked Turney "point blank why would a man living in a house like he was, with his job, get involved in something like this, and he said he didn't know and that he must be out of his mind. He then admitted his part in the theft to me and told me at that time where the property was." Thereafter, Turney directed the officers to the location of the stolen property. It will be thus observed that Sergeant Caldwell was not carrying out a process of interrogation for the purpose of obtaining incriminating statements.[1] The simple statement, above quoted, was responded to by the spontaneous admission of guilt by Turney. Petitioner was not denied the service of an attorney, nor was an attorney even requested, as in *Escobedo*. No promises were used; no nerve-racking interrogation was attempted, nor mistreatment rendered, in order to obtain the statement from Turney; in fact, there is no evidence at all of any sort of coercion or duress.

Surely it cannot be said that, under the facts here enumerated, petitioner was deprived of any constitutional right. We do not think that, under *Escobedo, any* statement or remark of a defendant, though without counsel, is automatically precluded. Turney does not appear to have been completely ignorant of legal procedure, for at

[1]Sergeant Caldwell testified: "It was not necessary to interrogate these men (Turney and Williams), because they voluntarily gave us the information."

arraignment he entered a plea of not guilty, and was advised that he should obtain an attorney. He thereupon employed competent counsel, who represented him in the trial of the case.

Sergeant Caldwell detailed all of the facts heretofore enumerated to the jury, and there was no objection to this testimony. In fact, it does not appear that anyone, including Turney himself, made any contention at the trial that any statements were involuntarily made.

We have concluded that movant was not deprived of any constitutional right, either under the Federal or state constitutions, and it follows that the motion seeking permission to file a petition for a writ of error *coram nobis* is denied.

APPENDIX

C

Supreme Court of the United States
No._____, October Term, 1965

HENRY TURNEY _____ *Petitioner*

v.

STATE OF ARKANSAS _____ *Respondent*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 20, 1966.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 16th
day of February, 1966

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1227~~ 106

HENRY TURNEY ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965
No. 1227

HENRY TURNEY _____ *Petitioner*

v.

STATE OF ARKANSAS _____ *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

I

The Petitioner's Right to Counsel Was Not Violated.

The petitioner Turney asserts that a statement made to Sgt. Leslie Caldwell, Arkansas State Police, was inadmissible in evidence under the exclusionary rule of *Escobedo* v. *Illinois*, 378 U.S. 478. However, *Escobedo* is distinguishable from this case on its facts and is not controlling. In *Escobedo* this Court pointed out that the crimi-

nal investigation involved was no longer a general inquiry into an unsolved crime, but had begun to focus on a particular suspect. The suspect had been taken into police custody; the police carried out a process of interrogation that lent itself to eliciting incriminating statements; the suspect had expressly requested and been denied an opportunity to consult with his counsel; and the police had not effectively warned him on his absolute constitutional right to remain silent. Here, on the other hand Sgt. Caldwell was not carrying out a process of interrogation lending itself to eliciting incriminating statements. The crime had been solved and Sgt. Caldwell knew the identity of the guilty persons. Sgt. Caldwell merely asked Turney why a person in his position would get involved in such a criminal undertaking. This question of Sgt. Caldwell was in no way connected with an attempt to force Turney to confess. It was just a passing comment responded to by a spontaneous admission of guilt.

Certain language in the case of *People* v. *Dorado*, 42 Cal. Rep. 169, 179, 398 P. 2d 361, 371, is helpful in this regard. In that case, the California court was considering the issue of admissibility of incriminating statements made without the benefit of counsel. In deciding that *Escobedo* was controlling it made the following observation:

> "Nothing that we have said, of course, should be interpreted to restrict law enforcement officers during the investigatory stage from securing information from one who is later accused of the crime or from obtaining answers to their questions. Indeed, any statements obtained without coercion, including of course, the unsolicited, spontaneous confession, given in the absence of the requirements for the accusatory stage, may be admitted into evidence. As the concurring opinion of Justice Traynor in *People* v. *Garner* (1961), 57 Cal. 2d 135, 164, 18 Cal. Reptr. 40, 57, 367 P. 2d 680,

697, states: So long as the methods used comply with due process standards it is in the public interest for the police to encourage confessions and admissions during interrogation."

The respondent State of Arkansas suggests that the methods employed by Sgt. Caldwell immediately preceding Turney's incriminating statement do comply with due process standards. There is no evidence that coercive measures were taken to elicit the spontaneous statement. The fact that investigating officers were not subjecting Turney to a nerve-racking interrogation as was present in and integral to *Escobedo*, distinguishes this case from the *Escobedo* situation. The distinction recognized in the case of *People* v. *Dorado, supra*, should be applied to render admissible such an unsolicited, spontaneous confession as that of Turney. As the case at hand is distinguishable from the *Escobedo* case, Turney's right to counsel had not attached at the time he made the incriminating statement; therefore, there was no denial of the right.

II

There Was No "Fruit of the Poisonous Tree" Used in Evidence Against Turney.

Turney's contention that the police secured involuntary confessions from Holeman and Stripling, then used evidence obtained as a result thereof against Turney in violation of the "fruit of the poisonous tree" doctrine is fallacious, for it does not appear that any evidence introduced against Turney was obtained as a result of information supplied by Holeman or Stripling. It is true that information given by Holeman and Stripling was useful in investigating and solving the crimes of which Turney was convicted, but it was not used to uncover facts introduced into evidence at trial; from which it follows that

the "fruit of the poisonous tree" doctrine has no application.

III

Evidence of The Stolen Property Was Not Obtained By Unreasonable Search and Seizure, But Was Voluntarily Provided By Turney Himself.

With reference to the evidence of the stolen property introduced at the trial, it appears that Turney himself gave the police the information leading to its recovery. Sgt. Caldwell's testimony reveals this: "He could not tell us but he could show us where all of the stolen property was". Shortly thereafter, Turney gave his unsolicited spontaneous confession to Sgt. Caldwell admitting his guilt and disclosing the location of the stolen property (R.256-259). It is a fact that Holeman and Stripling expressed a willingness to show the police where the stolen property was, but there is nothing in the record even to suggest that either Holeman or Stripling gave such information until Turney had made his incriminating statement to Sgt. Caldwell.

Further, with respect to the constitutional validity of the searches and seizures, it is suggested the matter depends on issues of fact decided not once, but twice, against Turney by the Supreme Court of Arkansas, which decisions constitute *res judicata* on the question.

As to Turney's asservation that the exclusionary doctrine of *Escobedo* extends to controlling the admissibility of property seized during a police search, it is enough to point out that no court in the land has sanctioned such an extension. *Escobedo* deals with the admissibility of incriminating statements or confessions, not with the admissibility of seized property.

IV

A Conviction Based On An Information By a Prosecuting Attorney Does Not Violate Due Process of Law.

Indictment by grand jury is not a prerequisite to due process of law in a criminal proceeding. The contrary proposition has been repeatedly rejected by this Court. *Washington* v. *State*, 335 U.S. 884; *Gaines* v. *Washington*, 277 U.S. 81; *Lam Woon* v. *Oregon*, 229 U.S. 586; *Hurtado* v. *California*, 110 U.S. 516.

V

There is Nothing in The Record to Indicate That Turney's Confession Was Involuntary.

If there were any evidence in the record to substantiate the proposition that Turney's confession was involuntary, the case of *Jackson* v. *Denno*, 378 U.S. 368, would come into play. However, since there is absolutely no such evidence, *Jackson* is quite beside the point.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 9, 1966